Supreme Court, U. S.
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in the

Supreme Court
of the
United States

October Term, 1979

CASE NO. 79-1498

VEN-FUEL, INC.,
a Delaware Corporation,

Petitioner,

vs.

DEPARTMENT OF ENERGY and its Secretary, CHARLES W. DUNCAN, JR.; ECONOMIC REGULATORY ADMINISTRATION and its Administrator, DAVID J. BARDIN; JAMES C. EASTERDAY as DIRECTOR OF ENFORCEMENT, Region IV, Economic Regulatory Administration, and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CASE NO.

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DEPARTMENT OF ENERGY and its Secretary, CHARLES W. DUNCAN, JR.; ECONOMIC REGULATORY ADMINISTRATION and its Administrator, DAVID J. BARDIN; JAMES C. EASTERDAY as DIRECTOR OF ENFORCEMENT, Region IV, Economic Regulatory Administration, and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Ven-Fuel, Inc., respectfully prays that a writ of certiorari issue to review the order of dismissal of the United States Court of Appeals for the Fifth Circuit entered in this proceeding November 26, 1979.

OPINION BELOW

The order of dismissal of the Court of Appeals, not reported, appears in the appendix hereto. The order of dismissal of the District Court for the Southern District of Florida, not reported, appears in the appendix hereto.

JURISDICTION

The order of dismissal of the Circuit Court of Appeals for the Fifth Circuit was entered November 26, 1979. A timely motion for rehearing was denied on December 28, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER §211(b)(2), ECONOMIC STABILIZATION ACT OF 1970, 12 USC §1904, NOTE, DEPRIVES THE CIRCUIT COURT OF APPEALS OF ITS JURISDICTION TO REVIEW THE DISTRICT COURT DISMISSAL OF A COMPLAINT WHEN NO EPAA ISSUE HAS BEEN RULED UPON OR ADJUDICATED.

STATUTORY PROVISIONS INVOLVED

28 USC §1294: Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit embracing the district;

The Emergency Petroleum Allocation Act, 15 USC §754(a)(1): . . . sections 209 through 211 of the Economic Stabilization Act of 1970 . . . shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter . . .

12 USC §1904, note, Economic Stabilization Act of 1970 §211(b)(2):

> . . . the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of the judgment by the district court.

STATEMENT OF THE CASE

In September, 1973, Ven-Fuel, Inc. entered into a contract to supply sulphur fuel oil to the Jacksonville Electric Authority (hereinafter "J.E.A."). Difficulties between the parties to the contract resulted in suit being filed in 1975 for monies due. The Federal Energy Administration (hereinafter "F.E.A.") the predecessor of the respondent, Economic Regulatory Administration (hereinafter "E.R.A.") was at that time looking into possible overcharges by Ven-Fuel, Inc. in connection with its sale of fuel oil to the J.E.A. under the contract. Settlement negotiations were undertaken and the

F.E.A. both acquiesced in and encouraged such settlement activity. F.E.A. approval of the settlement agreement and forbearance from further investigation with a $75,000 limitation of potential liability for penalties, was a condition precedent to the final settlement. Agreement was reached with the F.E.A. on November 5, 1975, confirmed by a letter dated November 6, 1975.

Approximately three years after the settlement agreement was executed and became binding on all of the parties thereto, as well as on the F.E.A., the E.R.A. through its Office of Enforcement, Region IV, issued a Notice of Probable Violation dated September 14, 1978 to Ven-Fuel, Inc. thereby initiating administrative review of the same issues previously resolved by settlement. Upon receipt of the notice, the Director of Enforcement was advised of the prior settlement, but this advice went unheeded and the administrative wheels continued to turn.

Believing that the respondents were acting in clear contravention of the previous agreement, and in excess of their jurisdiction with the continued pursuit of administrative action, Ven-Fuel, Inc. filed its complaint for declaratory judgment and injunctive relief in the United States District Court for the Southern District of Florida, Case No. 78-5603-Civ-NCR. A copy of the complaint, without exhibits, appears in the appendix hereto. Upon motion by the respondents, Ven-Fuel's complaint was dismissed "for failure to exhaust its administrative remedies". Rehearing was denied and Ven-Fuel took a timely appeal to the United States Court of Appeals for the Fifth Circuit. The respondents moved to dismiss the appeal for lack of jurisdiction on

the ground that exclusive jurisdiction to entertain any such appeal would lie with the Temporary Emergency Court of Appeals, pursuant to §211(b)(2) of the Economic Stabilization Act of 1970, as amended, 12 USC §1904. The motion to dismiss for lack of jurisdiction appears in the appendix hereto. On November 26, 1979 the respondents' motion to dismiss the appeal was granted and on December 28, 1979 the motion for rehearing was denied.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Jurisdictional Scope of Review by TECA.

Ven-Fuel commends to this Court the opinion authored by TECA in *Texaco, Inc., v. Department of Energy*, ____ F.2d ____, (TECA 1979) (Slip Op., No. DC-52-54, October 15, 1979), and the Second Circuit opinion in *Coastal States Marketing, Inc. v. New England Petroleum Corporation*, 604 F.2d 179 (2d Cir. 1979), for an excellent analysis of the separate appellate review functions of TECA and the Circuit Courts of Appeal. The opinions contain a thorough review of the decisional law and no effort will be made here to improve upon it. The Second Circuit concludes that the limited TECA jurisdiction is "issue" oriented and says:

> What is determinative, as the cases have implicitly recognized, is not the existence of an ESA [EPAA] issue, but whether the ESA [EPAA] issue has been adjudicated. [604 F.2d at p. 187].

TECA concurs in this view (slip opinion p. 10).

Here, Ven-Fuel says that no EPAA issue was involved in the first instance and, in any event, there had been no adjudication of an EPAA issue in the case below. The narrow question on this appeal was whether the complaint stated a cause of action sufficient to withstand a Rule 12(b)(6) motion to dismiss. The sole ground for the dismissal of the complaint was a failure to allege exhaustion of administrative remedies. The merits of the complaint were never reached.

A reading of the complaint reveals that Ven-Fuel did not challenge or dispute any EPAA rule, regulation, order, or administrative finding. The complaint did not, in any way, seek review of an agency determination made within its jurisdiction. Rather, it sought to restrain action undertaken clearly in excess of its jurisdiction. E.g., *Lee County School District Number 1 v. Gardner,* 263 F.Supp. 26 (D.S.C. 1967). See, *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958).

Ven-Fuel challenged the legality of initiating administrative proceedings when a settlement of the entire matter had previously been concluded. Ven-Fuel is entitled to seek injunctive relief without exhaustion of administrative remedies where, as here, the forced participation in the administrative process is the very injury complained of. Cf., *North American Van Lines, Inc. v. Interstate Commerce Commission,* 386 F.Supp. 665 (N.D. Ind. 1974). See, also, *Mandel v. U.S. Dept. of Health, Ed. and Welfare,* 411 F.Supp. 542 (D. Md. 1976). In numerous instances the principles of exhaustion of remedies have been held inapplicable to

suits against the Department of Energy and its predecessors: *United Refining Company v. Department of Energy, et al.,* ____ F.Supp. ____ (W.D. Pa. 1980) (Slip Op., No. 79-144, January 17, 1980); *Mobil Oil Corporation v. Department of Energy, et al.,* ____ F.Supp. ____ (S.D.N.Y. 1979) (Slip Op., 79 Civ. 4105 MJL, August 23, 1979); *Pennzoil Company v. Department of Energy,* 466 F.Supp. 238 (D. Del. 1979); *Phillips Petroleum Company v. Federal Energy Administration,* 435 F.Supp. 1239 (D. Del. 1977); and *Ashland Oil Company of California v. Federal Energy Administration,* 389 F.Supp. 1119 (N.D. Ca. 1975).

One of the principles behind the exhaustion doctrine is that it permits the agency to bring its expertise to bear when technical considerations are involved. This applies where the issues are intrinsic to the agency's operation. But where, as here, the issue is extrinsic, i.e., whether the agency action is in excess of its authority, exhaustion is not required. *United Refining Company, supra; Mobil Oil Corporation, supra; Pennzoil Company, supra; Phillips Petroleum Company, supra;* and *Ashland Oil, supra.* Furthermore:

> One thing the exhaustion doctrine makes clear is that it is not intended to require endless pursuit of agency procedures with respect to issues on which the agency has taken a final position.

Phillips Petroleum Company, 435 F.Supp. at p. 1248.

Parallel considerations governed both the motion to dismiss the complaint and the motion to dismiss the

appeal. Administrative agency expertise was unnecessary and exhaustion was not required. E.g., *United Refining Company, supra.* In similar fashion, the special competence of TECA was unnecessary to determine the limited issue on appeal. *Bray v. United States,* 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975).

By its appeal, Ven-Fuel claims that exhaustion was not a prerequisite for the relief sought and that its complaint stated a cause of action sufficient to withstand a Rule 12(b)(6) motion. If not, as an alternative basis for relief on appeal, Ven-Fuel claims entitlement to at least one opportunity to amend its complaint to plead its cause of action.

From the foregoing it should be clear that the limited issue on appeal, sufficiency of the pleading, did not encompass a review of an adjudication of an EPAA "issue". *Texaco, Inc. v. Department of Energy, supra; Coastal States Marketing, Inc. v. New England Petroleum Corporation, supra.* See, also, *Structural Steel and Ornamental Iron Association of New Jersey, Inc. v. Shopmen's Local Union No. 545 of the International Assoc. of Bridge Structural and Ornamental Iron Workers,* 478 F.2d 848 (3d Cir. 1973), where, as here, the appellant did not ask the appellate court to consider the trial court adjudication on its merits, but limited the scope of appellate review to a single issue. No construction of the EPAA or any regulation was necessary. Here, the merits were never reached in the district court and there was no "issue" for TECA's consideration.

By the dismissal of the appeal, the Fifth Circuit Court of Appeals presumed broader TECA jurisdiction

than TECA itself claims. TECA has construed its own jurisdiction in much more narrow terms. See, *Texaco, Inc., et al. v. Department of Energy, et al., supra.* At page ten of that opinion, citing *Coastal States Marketing, Inc. v. New England Petroleum Corp., supra,* TECA says:

> For purposes of determining TECA jurisdiction, what is determinative is not whether an EPAA question exists but whether an EPAA question has been adjudicated . . .
>
> Jurisdiction is to be strictly construed.

Had this appeal been taken to TECA rather than to the Circuit Court of Appeals, TECA would have been obligated to dismiss the appeal for lack of jurisdiction upon the same grounds and for the same reasons as stated in *Texaco, Inc. et al. v. Department of Energy, et al., supra.* The argument which the respondents espoused below in their motion to dismiss was, in essence, the broader jurisdictional position unsuccessfully taken in *Texaco, Inc. et al. v. Department of Energy, et al., supra,* as presented by Judge Hoffman in his dissent.

The Fifth Circuit Court of Appeals is not a court of special or limited jurisdiction as is TECA. The Circuit Court has jurisdiction over all appeals taken as a matter of right from the United States District Court for the Southern District of Florida. 28 U.S.C. §1294. The Circuit Court should have taken an inclusive view of its own jurisdiction, as TECA must take an exclusive view of its jurisdiction.

2. Case by Case Determination of Jurisdiction is Unsatisfactory

As TECA has acknowledged in its opinion in *Texaco, Inc. et al. v. Department of Energy, et al., supra,* TECA has consistently decided its jurisdiction on an issue-by-issue basis. The present system of "hit or miss" appellate jurisdiction is totally unsatisfactory. Jurisdiction should not be based upon case by case or issue by issue analysis. The circuit courts as well as TECA have recognized the confusion and possibility of dual appellate review. E.g., *Coastal States Marketing, Inc. v. New England Petroleum Corp., supra,* and *Texaco, Inc. et al. v. Department of Energy, et al., supra.* The suggestion that appeals be lodged in both courts as a precautionary measure is patently offensive. This suggestion does not preclude the distinct possibility that both courts will accept jurisdiction — or both will reject it, each court believing that jurisdiction lies with the other.

The dismissal of the appeal leaves Ven-Fuel, Inc. without appellate remedy. Neither remand nor direct transfer to TECA is available. *United States v. Cooper,* 482 F.2d 1393 (TECA 1973); *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corporation,* 591 F.2d 711 (TECA 1979).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix

[FILED NOV 26 1979]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3087

VEN-FUEL, INC.,
a Delaware corporation,
Plaintiff-Appellant,

versus

DEPARTMENT OF ENERGY and its
Secretary JAMES R. SCHLESINGER,
Etc., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is GRANTED.

[FILED DEC 28 '79]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3087

VEN-FUEL, INC.,
a Delaware corporation,
Plaintiff-Appellant,

v

DEPARTMENT OF ENERGY and its
Secretary JAMES R. SCHLESINGER,
Etc., ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for rehearing of this court's dismissal order of November 26, 1979, is DENIED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Civil Action No. 79-3087

Ven-Fuel, Inc.,
a Delaware Corporation,
Appellant,

v.

Department of Energy and its Secretary, Charles Duncan; Economic Regulatory Administration and its Administrator, David J. Bardin; James C. Easterday as Director of Enforcement, Region IV, Economic Regulatory Administration; and the UNITED STATES OF AMERICA,
Appellees.

**MOTION TO DISMISS
FOR LACK OF JURISDICTION**

Pursuant to Rule 27, Fed. R. App. P., federal appellees* respectfully move this Court to dismiss this action on the ground that the Court has no jurisdiction over the appeal by plaintiff-appellant Ven-Fuel, Inc. from the judgment of the district court below,

*James R. Schlesinger, the former Secretary of Energy, was a party defendant to the District Court action from which this appeal was taken. Pursuant to Rule 43(c)(1) F.R. App. P., Charles Duncan, the present Secretary of Energy, should be substituted as the party defendant.

dismissing its claim for failure to exhaust its administrative remedies. Exclusive jurisdiction to entertain any such appeal would lie with the Temporary Emergency Court of Appeals pursuant to Section 211(b)(2) of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. §1904 note (1976).

The Court is respectfully referred to the attached Memorandum of Points and Authorities filed in support of this Motion.

Respectfully submitted,

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[FILED APRIL 24, '79]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-5603-Civ-NCR

VEN-FUEL, INC.,
a Delaware corporation

vs.

DEPARTMENT OF ENERGY, etc.

ORDER OF DISMISSAL

THIS CAUSE is before the court on the motion of defendants to dismiss or, alternatively, to transfer. The basis for defendants' motion to dismiss is the failure of plaintiff to exhaust its administrative remedies. The court finds the reasoning of the cases cited by defendants in its memorandum on the issue of the necessity of the exhaustion of administrative remedies to be persuasive and finds that there are no exceptional factors in the instant case which would make judicial review prior to the exhaustion of administrative remedies appropriate. Accordingly, based upon the authorities cited by defendants and the court's review of the record, it is

ORDERED AND ADJUDGED that plaintiff's complaint is dismissed for failure to exhaust its administrative remedies.

DONE AND ORDERED this 23 day of April, 1979.

/s/ Norman C. Roettger, Jr.
U.S. District Judge

cc- counsel of record

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-5603-Civ-NCR

VEN-FUEL, INC.,
a Delaware corporation,

Plaintiff,

vs.

DEPARTMENT OF ENERGY and its Secretary, JAMES R. SCHLESINGER: ECONOMIC REGULATORY ADMINISTRATION and its Administrator, DAVID J. BARDIN; JAMES C. EASTERDAY, as Director of Enforcement, Region IV, Econoic Regulatory Administration; and THE UNITED STATES OF AMERICA,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, VEN-FUEL, INC., a Delaware corporation, by its undersigned attorneys, complains of the above-named Defendants, as follows:

1. The jurisdiction of the Court to hear this action is based upon the original jurisdiction of the Court to hear:

(a) Civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, that arise under the Constitution, laws or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity, 28 U.S.C. §1331(a).

(b) Civil actions arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies, 28 U.S.C. §1337.

2. Venue lies in this Court under 28 U.S.C. §1391(e) as each Defendant is an officer or employee of the United States or an agency thereof, and the Plaintiff resides in this District, and no real property is involved in this action, and, furthermore, it is in this District that the cause of action arose.

3. VEN-FUEL, INC. (hereinafter "Plaintiff") is a corporation organized and existing under the laws of the State of Delaware and its office and principal place of business is in Coral Gables, Dade County, Florida. Plaintiff is a reseller-retailer of fuel oil.

4. Defendant, DEPARTMENT OF ENERGY (hereinafter Defendant "DOE"), is a department of the executive branch of the United States Government.

5. Defendant, JAMES R. SCHLESINGER, is the Secretary of Energy, and an officer of the United States or an agency thereof.

6. Defendant, ECONOMIC REGULATORY ADMINISTRATION (hereinafter Defendant "ERA") is an agency of the DOE and is the successor agency to the Federal Energy Administration (hereinafter "FEA").

7. Defendant, DAVID J. BARDIN, is the Administrator of the ERA, and an officer or employee of the United States or an agency thereof.

8. Defendant, JAMES C. EASTERDAY, is Director of Enforcement for Region IV of the ERA, and an officer or employee of the United States or an agency thereof.

9. The fifth and last named Defendant is THE UNITED STATES OF AMERICA, through its duly constituted federal government.

10. Each of the above-named Defendants is being sued in its official capacity.

Facts Giving Rise To This Action

11. On September 14, 1978, Defendant ERA through its Office of Enforcement, Region IV, issued to the Plaintiff a Notice of Probable Violation (hereinafter "NOPV"), pursuant to 10 C.F.R. §205.191, with the case style "In the Matter of Ven-Fuels, Incorporated, Case No. 412-H-00068." A true and correct copy of said NOPV is attached hereto as Exhibit "1."

12. In pertinent part the NOPV issued to the Plaintiff charges:

"The Office of Enforcement of Economic Regulatory Administration (ERA) of the Department of Energy and the Federal Energy Administration (FEA) have conducted an audit of the books and records of Ven-Fuel, Inc. (Ven-Fuels) pursuant to the authority conferred by the Emergency Petroleum Allocation Act of 1973, as amended (EPAA), 15 U.S.C. §751, *et seq.* That audit focused upon sales of No. 6 fuel oil made from Ven-Fuel to the Jacksonville Electric Authority (JEA) during the period of October 1973 through October 1974." (at page 1).

"On the basis of information available to the ERA as a result of the audit described above, the ERA has reason to believe that violations of 6 C.F.R. §150.359 and 10 C.F.R. §212.93 have occurred between October 1973 and October 1974 as further described herein" (at page 2).

13. The thrust of the NOPV as thus issued is the possibility that overcharges occurred in connection with the Plaintiff's sales of No. 6 fuel oil of varying sulphur grades to the Jacksonville Electric Authority (hereinafter "JEA").

14. On September 21, 1973, the Plaintiff entered into a contract with the JEA, a municipally owned electric utility company in Jacksonville, Florida, to supply 3.6 million barrels of 1.8% sulphur fuel oil at $5.25 per barrel and 900,000 barrels of 2.5% sulphur fuel oil at $4.05 per barrel, both prices subject to the Venezuelan Government's escalation of its "Host

Government Take" (HGT). At that time JEA also signed contracts with JOC Oil and Conoco Oil Company, whereby JOC Oil was to supply 3.7 million barrels of 1.8% sulphur fuel oil to JEA at approximately $5.65 per barrel and Conoco to supply 900,000 barrels of 1% sulphur fuel oil at the *Platts Oil Gram* posting price, F.O.B. Europe.

15. Shortly thereafter, the so-called "Arab Oil Embargo" erupted, creating an "energy crisis" from which the many electric utilities throughout the United States began to suffer sudden scarcities and an overall extremely tight supply of petroleum and petroleum products. Also at that time, JOC Oil defaulted on its contract with JEA, never having delivered any fuel oil whatsoever to JEA. Conoco declared force majeure on its JEA contract, having delivered approximately 450,000 barrels of its 900,000 barrel commitment. JEA, continuing to receive its contracted for fuel oil supply from the Plaintiff, requested the Plaintiff to increase the contractual volume to make up for the aforementioned suppliers who were unable to meet their commitments to JEA. Plaintiff complied with JEA's request and was able to deliver the additional volumes needed by JEA.

16. On November 21, 1973, the Plaintiff and JEA amended their contract to provide for an additional volume of 3.7 million barrels of 1.8% sulphur fuel oil at the contract price of $5.20 per barrel for the first 600,000 barrels in October and November, 1973, and for the first 300,000 barrels each month thereafter, and for monthly volumes in excess of those volumes, at an additional $1.02 per barrel. The contract amendment also provided that the base contract price of $4.05 per barrel for the 2.5% sulphur would escalate to $5.77021 and for the

1.8% sulphur from $5.20 to $7.06656 per barrel effective November 1, 1973, to account for the increased Venezuelan HGT.

17. When Conoco declared force majeure on its 1% sulphur fuel oil, JEA was left completely without that grade of oil and turned to the Plaintiff, and the Plaintiff delivered two spot cargoes at mutually agreeable prices, outside the contract volumes. The Plaintiff next aided JEA by helping them to utilize a tanker ("Delian Spirit") which JEA had chartered for six months at a very high rate of 360 worldscale (360 W.S.). As a genuine effort to help JEA in very difficult times, Plaintiff arranged for JEA to be able to utilize that tanker, which was otherwise costing JEA approximately $10,000.00 a day to transport its Venezuelan fuel oil purchased from the Plaintiff. The Plaintiff's efforts in that regard allowed JEA to defray a good part of their expenses on a costly charter of the vessel, and, more importantly, to reduce their cost of fuel oil purchased from the Plaintiff by paying an FOB price rather than a CIF price, as contracted for. The savings to JEA amounted to approximately $280,000.00.

18. During the term of the contract which roughly corresponded to the period in which the world was faced with the Arab oil embargo and the onset of the energy crisis, the HGT of all the producing countries escalated to unprecedented levels. Venezuelan HGT was no exception, thus, the 1.8% sulphur price rose from $5.20 to $11.50 per barrel, and the 2.5% sulphur price rose from $4.05 to $10.07 per barrel. However on three separate occasions, Venezuelan HGT increased by a total amount of approximately $.63 per barrel which amount was absorbed by the Plaintiff at the behest of

JEA, which urged that it could not afford to pay the increases. The Plaintiff was able to negotiate with its suppliers and in a spirit of cooperation, said suppliers and the Plaintiff agreed to absorb the three HGT increases. Practically every other utility in Florida and the United States, East and Gulf coasts paid the additional HGT increases during said time. Total savings to JEA amounted to slightly over $3 million dollars.

19. The history of the Plaintiff's contract with JEA was one of reliable supply, cooperation and restraint the plaintiff never once failed to deliver fuel oil to JEA, at a time when even the largest oil companies in the world were declaring force majeure and failing to deliver during the Arab oil embargo, the Plaintiff was selling to JEA at the level of eight and nine dollars per barrel, at a time when such oil was selling for as high as $24.00 to $28.00 per barrel on the world spot market. The Plaintiff was a reliable and reasonable supplier to JEA when other major oil companies refused to do business with JEA, because of, *inter alia,* the low price which JEA sought. Moreover, the large oil companies and tanker owners were reluctant to deal with Florida purchasers at the time, because of the State of Florida's overly strict Oil Bill Law. The Plaintiff was faced with the same risks as the other suppliers regarding that law, but continued to sell and deliver to JEA.

20. For reasons unknown to the Plaintiff, JEA did not live up to its contractual obligations to allow Plaintiff to match any *bona fide* competitive offer to supply JEA for the 1974-1975 year. The FEA intervened directing the Plaintiff to continue to serve as JEA's

"base supplier", in accordance with FEA regulations in effect at that time.

21. Shortly thereafter, JEA withheld from the Plaintiff some $6 million dollars covering five unpaid invoices representing fuel oil delivered under the September 21, 1973 contract, as amended. The Plaintiff was forced to bring suit against JEA for breach of contract in unlawfully failing to pay for the fuel oil supplied. This civil action entitled *"Ven-Fuel Inc. v. Jacksonville Electric Authority, et al."* was filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, General Jurisdiction Division, Case No. 75-7014 (Testa J). On November 7, 1975, Plaintiff and JEA, on behalf of its customers, entered into a Settlement Agreement whereby the Plaintiff agreed to withdraw and dismiss its suit against JEA in return for JEA making a Settlement Payment of $5,429,552.20 in satisfaction of the JEA outstanding payment for the five above-mentioned invoices. A true and correct copy of said Settlement Agreement is attached hereto as Exhibit "2".

22. The Federal Energy Office (hereinafter "FEO") and the FEA, as successor agencies to the ERA, had at all significant times prior to and during the negotiation of said Settlement Agreement been successively authorized to investigate and deal with possible violations of price regulations for petroleum products, and the FEA was at that time looking into possible overcharges by the Plaintiff in connection with its sale of fuel oil to JEA. The FEA was fully aware of the Settlement Agreement between the Plaintiff and JEA, and acquiesced in and encouraged such settlement. The Plaintiff relied on a tacit understanding

with the FEA that there were no instances of violations of FEA regulations and no overcharges in the JEA contract, but that if FEA were to investigate the Plaintiff, any violations and potential liability of Plaintiff would be limited to $75,000.00 an amount over and above the Settlement Payment to be made by JEA to the Plaintiff. This arrangement was arrived at by way of a telephone conversation of November 5, 1975, between Mr. Thomas R. McDade of the law firm of Fulbright and Jaworski in Houston, Texas, then counsel for the Plaintiff, and Mr. Douglas Robinson, of the General Counsel's office of the FEA at that time. In accordance with such arrangement with the FEA, the Plaintiff maintained the sum of $75,000.00 in a bank account at the Flagship Bank of Miami, in Miami, Florida for a period of thirty (30) days. Mr. McDade had been assured by Mr. Robinson that by acquiescing in and encouraging the consummation of the Ven-Fuel/JEA Settlement Agreement of November 7, 1975, the FEA was waiving any right it may have had to bring pricing regulations against the Plaintiff, other than any such violation up to a maximum penalty of $75,000.00. Such arrangement is documented by a letter dated November 6, 1975 from Mr. McDade and Mr. Robinson, a true and correct copy of said letter being attached hereto as Exhibit "3".

23. Moreover, as part of the Settlement Agreement, which is Exhibit "2" hereto, the Plaintiff and JEA executed mutual releases on behalf of their own entities as well as on behalf of the customers of JEA and the City of Jacksonville.

24. Approximately three years after the Settlement Agreement was executed and became

binding on all of the parties thereto as well as on the FEA, as predecessor to the ERA, the ERA, through its Office of Enforcement, Region IV, issued its NOPV dated September 14, 1978, to the Plaintiff which was served at the Plaintiff's offices in Coral Gables, Florida on September 15, 1978.

25. In connection with the issuance of this NOPV, which was originally incorrectly served on Mr. Thomas McDade, who no longer represents the Plaintiff, Mr. McDade on September 14, 1978 wrote a letter to Defendant, James C. Easterday, as Director of Enforcement, Region IV, of ERA, a true and correct copy of said letter being attached hereto as Exhibit "4". This letter reflects Mr. McDade's reaction on learning that Defendant DOE and its supporting agencies had breached the express agreement not to bring price control violations against the Plaintiff, and it states in pertinent part:

> "I should like to point out that the DOE can expect that I will be a witness at any proceeding involving DOE for the reason that DOE breached its express agreement and understanding with the City of Jacksonville and Ven-Fuel in connection with the settlement of the litigation in which those parties were involved, which settlement was consummated on November 7, 1975. In my judgment, DOE has committed an act of fraud in connection with the purported NOPV, and I should hope that Ven-Fuel will seek to satisfy the settlement with the City of Jacksonville based upon the fraudulent misrepresentations of DOE."

26. Neither Defendant DOE nor the above-named Defendant agencies and/or officers have heeded this and other protests and objections made to the NOPV by the Plaintiff, its attorneys and Mr. McDade since the date of its issuance. One such material objection is the fact that certain original documents, records and files which are corporate property belonging to Plaintiff have been and to the present continue to be retained by a Federal Grand Jury in Jacksonville, Florida. The Plaintiff has been unable to obtain, at the very least, complete and totally legible copies of all documents as would be necessary to frame its reply to the NOPV, and it continues to be under a serious disability to fully respond to the NOPV, which disability is caused by the continuing wrongful refusal of the United States Attorney for the Middle District of Florida, in charge of the Jacksonville Grand Jury, to return Plaintiff's original documents. The DOE through its Regional Counsel, Mr. F. Edwin Hallman, Jr. has compelled Plaintiff to file a reply to the NOPV by the close of business, Friday, December 15th, 1978. A true and correct copy of the letter dated November 21, 1978 from Mr. Hallman setting this deadline is attached hereto as Exhibit "5". Consequently the Plaintiff's reply to the NOPV, to be submitted to the DOE concurrent with the filing of this action, is an unavoidably incomplete and abbreviated response to said NOPV, forcing the Plaintiff to undercut its defense posture in relation to said NOPV, and Plaintiff is submitting said reply under protest and without any waiver of those remedies pursued herein.

27. The above-described disability on Plaintiff's part to fully respond to the NOPV results by reason of a raid and seizure of certain original documents, records

and files which are corporate property belonging to the Plaintiff, which raid and seizure was carried out by the abovesaid Jacksonville Grand Jury, in purported connection with that body's investigations, at the Plaintiff's offices in Coral Gables, Florida in October, 1974.

28. Through means unknown to the Plaintiff, those documents, records and files belonging to the Plaintiff were made available to other United States Governmental agencies, including the FEA, predecessor in interest to Defendants ERA and DOE. It is these Defendants' random and fortuitous use of seized documents in a disorganized state in the custody of the above-said Jacksonville Grand Jury which provides the sole basis for the so-called "audit of the books and records Ven-Fuels, Inc." stated in the NOPV. However, at no time significant hereto has a proper audit of the Plaintiff been conducted at its offices, nor has the Plaintiff been afforded an opportunity to explain and clarify what might otherwise be unintelligible, misleading or unclear documents used by Defendant ERA.

Nature of this Action

29. This is a suit for a declaratory judgment, pursuant to 28 U.S.C. §2201, that the NOPV which Defendant DOE through its supporting agency, Defendant ERA, issued to the Plaintiff on September 14, 1978, was improperly issued, and that such NOPV is null and void, of no effect and unauthorized by law, and for such further and necessary or proper relief, including granting of an injunction, to enjoin Defendants from

taking any action in a proceeding to enforce said NOPV based on such declaratory judgment, 28 U.S.C. §2202.

30. The Plaintiff, because of the gravity of the actual and threatened harm to it arising from the actual and threatened enforcement by these Defendants of said NOPV requests a speedy hearing in advancement of this cause on this Court's calendar pursuant to Rule 57 of the Federal Rules of Civil Procedure.

31. In view of these Defendants' actual and threatened enforcement of the NOPV and Plaintiff's contention that the NOPV is null and void, of no effect, and its issuance improper and unauthorized by law, there is an actual controversy within the jurisdiction of this Court, and a binding declaration by this Court, as to the validity of the NOPV, will effectively adjudicate the rights of the parties.

First Wrong Complained Of

32. The Plaintiff repeats, realleges and reiterates herein all of the allegations contained in paragraphs 1 through 30 of this Complaint.

33. Defendant DOE and the other Defendant agencies and/or officials are estopped from asserting the NOPV, Exhibit "1" hereto, against the Plaintiff because the FEA, as their predecessor in interest, agreed with the Plaintiff to refrain from bringing price control violations against the Plaintiff, which agreement induced the Plaintiff to make the afore-described settlement with JEA.

34. The NOPV threatens imposition on the Plaintiff of certain penalties described in 10 C.F.R. §205.203 if it is determined that a violation has occurred. However, the FEA, as predecessor in interest to these Defendants, has previously waived any right it may have had to bring pricing violations against the Plaintiff, by reason of its having exercised its authority pursuant to 10 C.F.R. §205.203(b)(2). This subsection provides:

> (b)(2) The FEA may at anytime refer the violation to the Department of Justice for the commencement of an action for civil penalties. *Where the FEA considers it to be appropriate or advisable, it may compromise, settle and collect civil penalties.* (Emphasis added).

35. It was precisely this authority which the FEA, acting through Mr. Douglas Robinson of its General Counsel's Office, exercised back in November of 1975 in relation to the then suspected overcharges by the Plaintiff. The FEA's unequivocal position at that time was to induce the Plaintiff to consumate its Settlement Agreement with JEA, Exhibit "2" hereto, and in return, to forego any right it may have had to seek any penalties against the Plaintiff in excess of a contingent maximum penalty of $75,000.00, such contingent penalty to last for a period of thirty (30) days. Thereafter, the FEA, as predecessor in interest to these Defendants, waived any right it may have had to bring pricing violations against the Plaintiff in connection with the JEA contract. This oral agreement between Mr. Robinson of the FEA and Mr. McDade, then counsel for the Plaintiff, is documented by Mr. McDade's letters of November 6,

1975 and September 14, 1978, Exhibits "3" and "4" hereto respectively.

36. In addition, these Defendants are further estopped from seeking to impose remedies against the Plaintiff for the violations alleged in the NOPV by reason of the Full and Complete General Mutual Release of November 7, 1977, which was executed by the Plaintiff and JEA simultaneous with the Settlement Agreement of the same date. A true and correct copy of this Full and Complete General Mutual Release is attached hereto as Exhibit "6".

37. Said Release, having been acquiesced in and encouraged by the FEA, as predecessor in interest to Defendants ERA and DOE, was entered into by JEA on behalf of its customers and expressly released the Plaintiff from any and all liabilities to JEA's customers.

38. The purpose of a compliance remedy is to correct the harm caused by the violation. In the case of an overcharge by a utility supplier the remedy indicated by Sections 5.501.00 and 5.501.01 of the CCH edition of the ERA Enforcement Manual and 10 C.F.R. §205.195 is a refund to be distributed on a pro rata basis to the customers of the utility who were adversely affected by the overcharge. In pertinent part, 10 C.F.R. §205.195(a), addressing remedies, provides:

> (a) . . . Such action may include a direction to the person to whom the order is issued *to make refunds directly to any purchasers of the products involved, notwithstanding those purchasers obtaining such products from an*

intermediate distributor, [e.g. public utility] of such persons products . . ." (emphasis and bracketed material added).

39. Consequently, any overcharge which might be collected by Defendants DOE and ERA in addition to the settlement made between the Plaintiff and JEA would necessarily revert to JEA's customers, who have previously and unconditionally released the Plaintiff from any further liability. Perforce, these Defendants are estopped from seeking to impose any such remedy against the Plaintiff through the means of the NOPV.

Second Wrong Complained of

40. The Plaintiff repeats, realleges and reiterates herein all of the allegations contained in paragraphs 1 through 30 of this Complaint.

41. The NOPV, as issued, is null and void, of no effect, and its issuance improper and unauthorized by law by reason of Defendant ERA's non-compliance with its own internal policies, procedures and regulations:

(a) Contrary to the procedure outlined in Section 5.102.02 of the CCH edition of the ERA Compliance Manual (1978), the ERA did not precede its issuance of the NOPV with an issue letter containing a request for a written reply by the Plaintiff such as would have enabled these Defendants to ascertain the Plaintiff's position on the factual and interpretive matters that are the subject of the NOPV, and on the estoppel by agreement outlined above.

(b) The so-called "audit of the books and records of Ven-Fuels, Inc." was in direct contravention of the clear Audit Guidelines set forth under Chapter 4 of the CCH edition of the ERA Enforcement Manual (1978). The consequence of this is to point up that the Plaintiff was not properly audited by Defendant ERA in the preparation of its findings toward the NOPV. To contend that Defendant ERA's random and fortuitous use of seized documents in a disorganized state, improperly made available to said Defendant by the above-mentioned Jacksonville Grand Jury, constitutes an "audit" of the Plaintiff's books and records is a gross misstatement of fact and an incorrect application of the terms of 15 U.S.C. & 751 *et seq* and 10 C.F.R. §201.1 *et seq*. If a proper audit of the Plaintiff's books and records had been conducted at the Plaintiff's office, the Plaintiff would have been afforded the opportunity to explain and clarify what had to have been unintelligible, misleading or unclear to Defendants DOE and ERA's "auditors." Moreover, the fact that these Defendants used a random set of seized documents could not have insured the documents constituted an accurate reflection of the Ven-Fuel/JEA contract over the period from October, 1973 to October, 1974.

42. Consequently, the issuance of the NOPV was improper and unauthorized by the very procedures and policies which are internally used by Defendant ERA, and said NOPV must be declared null and void and of no effect.

Third Wrong Complained Of

43. The Plaintiff repeats, realleges and reiterates herein all of the allegations contained in paragraphs 1 through 30 of the Complaint.

44. It is now in excess of four (4) years since the offices of the Plaintiff were raided and its original documents, files and records seized in purported connection with the above-mentioned Jacksonville Grand Jury. Repeated requests have been made to the United States Attorney for the Middle District of Florida, in charge of said Jacksonville Grand Jury, to return these original documents so as to enable the Plaintiff to prepare its response to the NOPV. Notwithstanding this, these original documents continue to be retained by the Jacksonville Grand Jury, and the Plaintiff has been likewise refused complete and legible copies of all such documents. The Plaintiff continues to be under a serious disability to fully respond to the NOPV, which disability is caused by the continuing wrongful refusal of the United States Attorney for the Middle District of Florida to return to Plaintiff the original documents which are the corporate property of the Plaintiff.

45. While none of these Defendants has the apparent authority to order or facilitate that said documents be returned, they must at the very least be restrained from pursuance of the NOPV against the Plaintiff while this disability persists and while it attempts to obtain the release of all said original documents, which in addition to those taken during the October, 1974 raid and seizure at Plaintiff's offices, now include other papers which have been subsequently

produced, and likewise lost, through various witness subpoenas issued to the Plaintiff and its former attorneys, the law firm of Fullbright and Jawarski in Houston, Texas, in purported connection with the above-said Jacksonville Grand Jury.

46. The Defendants, unless enjoined and restrained will continue to pursue and seek to enforce the NOPV against the Plaintiff, and the Plaintiff will be subjected to the improper enforcement against it of said NOPV, including the imposition of the penalties and remedies against the Plaintiff, all of which will cost the Plaintiff great expense and hardship.

WHEREFORE the Plaintiff demands (1) that the NOPV issued to it by Defendant ERA pursuant to 10 C.F.R. §205.191 on September 14, 1978 be declared null and void, of no affect, and its issuance improper and unauthorized by law; (2) that this Court restrain these Defendants and their officers, employees, agents or servants from pursuing and/or enforcing said NOPV; (3) that pending the final hearing and determination of this cause, a preliminary injunction issue restraining these Defendants, their officers, employees, agents or servants from pursuing and/or enforcing said NOPV; and (4) that this Court issue such other or further relief as it may deem necessary and proper.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

VEN-FUEL, INC., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1) and the district court (Pet. App. 5-6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1979. A petition for rehearing was

denied on December 28, 1979 (Pet. App. 2). The petition for a writ of certiorari was filed on March 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exclusive appellate jurisdiction of the Temporary Emergency Court of Appeals over "all appeals from the district courts of the United States in cases and controversies arising under" the Emergency Petroleum Allocation Act extends to an appeal from a judgment of the district court dismissing an EPAA claim for failure to exhaust administrative remedies.

STATUTES INVOLVED

The pertinent provisions of 15 U.S.C. 754(a)(1) and 12 U.S.C. 1904 note are set forth at Pet. 3.

STATEMENT

Petitioner Ven-Fuel, Inc., commenced this suit in the United States District Court for the Southern District of Florida to enjoin the Department of Energy from continuing with an administrative proceeding against petitioner to enforce the price control limitations of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. 751 *et seq.* In initiating the administrative proceeding, DOE alleged that petitioner had charged an excessive price for fuel oil sold to the Jacksonville, Florida, Electric Authority.[1]

[1] 15 U.S.C. 754 confers authority upon DOE to enforce the price control provisions of the EPAA. Pursuant to that authority, the agency issued regulations establishing an administrative enforcement mechanism which, as here, is triggered by the issuance of a "Notice of Probable Violation" of the Act. See 6 C.F.R. 150.359; 10 C.F.R. 212.93.

Petitioner asserted in its district court complaint that the price dispute had previously been settled among all parties and that the enforcement proceeding was accordingly improper (Pet. App. 7-26).

The district court granted DOE's motion to dismiss the complaint on the ground that petitioner had failed to exhaust its administrative remedies (Pet. App. 5-6). When petitioner appealed that order to the United States Court of Appeals for the Fifth Circuit, DOE moved to dismiss the appeal on the ground that the case "arose under" the EPAA and thus that, under Section 211(b)(2) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note,[2] the Temporary Emergency Court of Appeals ("TECA") has exclusive jurisdiction over "all appeals" in such cases (Pet. App. 3-4). The court of appeals granted the motion to dismiss the appeal (Pet. App. 1).

ARGUMENT

1. Petitioner argues that TECA's jurisdiction is strictly limited to "issues" that involve the validity, interpretation, or application of the EPAA, or regulations or orders promulgated thereunder. More

[2] Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1), expressly incorporates the judicial review provision found in Section 211(b)(2) of the ESA. Accordingly, where appropriate, the statutes hereinafter will be referred to collectively as the "EPAA."

specifically, petitioner contends that TECA lacks the power to resolve threshold issues of general law, such as exhaustion of administrative remedies, that may be involved in the disposition of an EPAA claim. Such questions, says petitioner, are not EPAA "issues" within TECA's jurisdiction, but are instead within the exclusive jurisdiction of the eleven circuit courts of appeals.[3] In other words, petitioner would bifurcate appeals of orders disposing of an EPAA claim on both EPAA and non-EPAA grounds, with the EPAA ground going to TECA and the non-EPAA ground going to the circuit courts.

The decision of the court of appeals is correct and does not warrant review by this Court. Petitioner's proposed jurisdictional approach is inconsistent with the plain language of Section 211(b)(2) of the ESA and with the policy of judicial economy and expedition that Congress intended to promote in granting appellate jurisdiction to TECA. Section 211

[3] Petitioner asserts (Pet. 6) that its claim in the district court did not "arise under" the EPAA or the regulations issued thereunder because the complaint "did not challenge or dispute any EPAA rule, regulation, order, or administrative finding * * *." However, petitioner has not presented this as a question for review, and the construction of this specific complaint clearly is of no general importance. In any event, it is readily apparent that the complaint asserted a claim based directly upon the EPAA and the implementing regulations (Pet. App. 20-23). Indeed, had the claim not "arisen under" the EPAA, dismissal for lack of jurisdiction would have been compelled because the complaint did not allege any other basis of subject matter jurisdiction.

Petitioner also argues (Pet. 6-8) that the district court's decision on the exhaustion issue is incorrect. We disagree, but the point is irrelevant to the narrow jurisdictional issue presented in the petition.

(b)(2) unequivocally provides that, in cases "arising under" the Act, TECA has appellate jurisdiction over "all appeals," not merely those raising "pure" EPAA issues:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of *all appeals* from the district courts of the United States *in cases and controveries arising under this title or under regulations or orders issued thereunder.* (Emphasis supplied)

As this Court has emphasized, the provision was designed "to provide speedy resolution of cases brought under the [Emergency Petroleum Allocation] Act and 'to funnel into one court [TECA] all the appeals arising out of the District Courts and thus gain in consistency of decision.'" *Bray* v. *United States*, 423 U.S. 73, 74 (1975), quoting from S. Rep. No. 92-507, 92d Cong., 1st Sess. 10 (1971).

Other sections of the statute confirm the plain meaning of the jurisdictional provision. Thus, Section 211(c) of the ESA provides that, upon the mandatory certification of "a substantial constitutional issue," TECA may determine "that the entire action be sent to it for consideration * * *." This subsection recognizes that TECA's jurisdiction extends over "the entire action," including questions of constitutional magnitude, not merely issues involving the construction and application of the EPAA. Similarly, Section 211(d)(2) of the ESA provides for exclusive appellate jurisdiction in TECA over certified district court

decisions granting or denying preliminary injunctions, even though such appeals frequently will turn on general issues such as irreparable injury or ripeness.[4]

There also are several practical problems with petitioner's suggested approach. Mandating split appeals on a single claim hardly promotes judicial economy and expedition. As the Tenth Circuit recently noted regarding such bifurcated appeals, "[t]here is little to be gained, * * * other than mass confusion, by the promoting of simultaneous circuit court-TECA appeals." *Oklahoma Association of Energy Consumers and Producers* v. *FEA*, No. 79-1847 (Oct. 23, 1979) slip op. 5. It would, in fact, complicate and significantly lengthen appeals in EPAA cases, contrary to the congressional objective of expedition, because EPAA claims normally will involve both "pure" EPAA issues and procedural issues that turn on general legal principles not peculiar to EPAA claims. In addition, petitioner's approach would require the courts, before taking jurisdiction over an appeal, to make a preliminary assessment of whether or not the issues raised were "pure" EPAA issues. However, as even petitioner recognizes (Pet. 10), "[j]urisdiction

[4] See also Section 211(b)(1) of the ESA, which provides that TECA "shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title." While this subsection does not directly address the scope of TECA's jurisdiction, its language militates strongly against any attempt to draw distinctions between TECA's appellate powers and those of a circuit court of appeals.

should not be based upon case-by-case or issue-by-issue analysis."

2. Petitioner contends (Pet. 5) that the decision below conflicts with the Second Circuit's decision in *Coastal States Marketing, Inc.* v. *New England Petroleum Corporation*, 604 F.2d 179 (1979), and TECA's decision in *Texaco, Inc.* v. *Department of Energy*, No. D.C.-52 (Oct. 15, 1979). This contention is insubstantial.

In *Coastal States*, unlike the present case, the district court's original jurisdiction was not based upon a claim that "arose under" the EPAA. Rather, the EPAA issue was presented by way of defense and counterclaim to the plaintiff's breach of contract action. The district court rejected the EPAA-related defense and granted judgment for the plaintiff. The Second Circuit, in dismissing the appeal, held that the phrase " 'cases and controversies arising under' the [EPAA], as used in § 211(b)(2), means adjudications by a district court of an '[EPAA] issue' " (604 F.2d at 187), even where the issue has been presented by way of defense or counterclaim. The court of appeals noted however, that TECA should not be burdened where one of the parties seeks relief on both EPAA and non EPAA grounds, but judgment is entered only on the non-EPAA ground. "What is determinative," said the court, "is not the existence of an [EPAA] issue, but whether the [EPAA] issue has been adjudicated." *Ibid.* (footnote omitted). Here, petitioner's sole claim for relief was based on an asserted violation of the EPAA and its imple-

menting regulations (see note 3, *supra*). The district court adjudicated that claim in holding that petitioner had not exhausted its administrative remedies. Hence, *Coastal States* does not conflict with the decision below.[5]

Texaco is no more helpful to petitioner. There, the Federal Energy Regulatory Commission had dismissed an appeal from an EPAA-related order issued by DOE's Office of Hearings and Appeals on the ground that FERC had no jurisdiction to review the challenged order under the terms of its jurisdictional statute, Section 504(b)(1) of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. (Supp. II) 7194(b)(1). When plaintiffs subsequently challenged the order in the district court, one of the plaintiffs claimed that, under the DOEOA, FERC's disavowal of jurisdiction was improper. The district court, without addressing the EPAA claims, held that FERC had jurisdiction under the DOEOA and remanded the proceeding to FERC. On appeal, the only issue was the propriety of FERC's refusal to review DOE's order, a question of statutory construction solely involving the DOEOA. TECA dismissed the appeal, concluding that the mere fortuity that the separate complaint under the DOEOA was presented with other claims arising under the EPAA

[5] *Structural Steel and Ornamental Iron Association of New Jersey, Inc.* v. *Shopmen's Local Union No. 545*, 478 F.2d 848 (3d Cir. 1973), cited by petitioner (Pet. 8), is also not inconsistent with the instant case. There, the claim asserted in the district court arose under the Arbitration Act, not EPAA, and no EPAA issue was raised on appeal.

was insufficient to confer jurisdiction over the DOEOA claim.

Since FERC's jurisdiction under the DOEOA was a matter wholly separate from and not merely a facet of the EPAA claims, *Texaco* is consistent with *Coastal States* and with a number of prior TECA decisions refusing to assert jurisdiction over claims arising under other federal laws merely because they are joined with claims arising under the EPAA.[6] By contrast, exhaustion of administrative remedies is not an independent claim or cause of action; it is a procedural defense that may be asserted in the course of adjudicating a claim or a cause of action, including causes of action arising under the EPAA, and the defense is inextricably related to the cause of action itself.[7]

TECA recently dispelled any possible confusion that might have resulted from its decision in *Texaco*. In *Quincy Oil, Inc.* v. *FEA*, No. 1-5 (TECA Apr. 24, 1980), the sole issue raised on appeal was whether plaintiffs' challenge to an administrative ruling interpreting certain regulations became moot when DOE revoked the challenged ruling and issued a new ruling adopting the position espoused by plaintiffs.

[6] See, *e.g.*, *Spinetti* v. *Atlantic Richfield Co.*, 522 F.2d 1401 (TECA 1975); *City of Groton* v. *FPC*, 487 F.2d 927 (TECA 1973).

[7] TECA's conclusion in *Texaco* that it has jurisdiction only over issues *or* claims arising under the EPAA (slip op. 10) may refer to the possibility that TECA's appellate jurisdiction extends, as *Coastal States* held, to cases where EPAA "issues" arise during the litigation of non-EPAA claims.

Relying, as does petitioner, upon *Coastal States* and *Texaco*, plaintiffs argued that TECA had no jurisdiction over the appeal because "mootness" was a question of general or constitutional law rather than an EPAA issue. TECA, however, sustained its jurisdiction because the substantive claim or cause of action "arose under" the EPAA (slip op. 7-8):

> Mootness, however, is not an "issue" that arises independently of the substantive claim or cause of action being challenged as moot. Rather, the doctrine of mootness questions the continuing vitality of a substantive claim or cause of action under adjudication and has no life apart from that substantive claim.
>
> Furthermore, to apply the term "issue" as it is used in *Texaco* and *Coastal States* to mootness—and by logical extension to other subsidiary, procedural and threshold questions such as standing, ripeness and venue—would remove those questions from this court's jurisdiction and thus prevent it from performing the normal and necessary functions of any appellate court. We have consistently exercised jurisdiction over such matters. *National Helium Corp.* v. *FEA*, 569 F.2d 1137 (TECA 1977) (procedure); *Mosler* v. *Nationwide Purchasing Inc.*, 485 F.2d 418 (TECA 1973) (venue); *Standard Oil Co.* v. *DOE*, 596 F.2d 1029 (TECA 1978) (ripeness); *City of New York* v. *New York Telephone Company*, 468 F.2d 1401 (TECA 1972) (exhaustion of administrative remedies).

The final example cited in the quoted passage, "exhaustion of administrative remedies," is the very point at issue here.[8] Hence, petitioner is plainly incorrect in asserting (Pet. 9) that TECA "would have been obligated to dismiss [its] appeal for lack of jurisdiction," and the court of appeals therefore properly deferred to TECA's exclusive jurisdiction under the EPAA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] In another recent case, TECA sustained its jurisdiction where the claim in the district court "arose under" the EPAA, but the only issue raised on appeal—an estoppel defense—was a "general question of administrative law." *United States* v. *Wickland*, No. 9-45 (Apr. 18, 1980).

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